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IN THE

Supreme Court of the United States

No. 70-5015

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

MOTION OF STATE OF ALASKA FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE

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The State of Alaska by its Attorney General, John E. Havelock, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.*

The applicant has an interest in this case in that the decision will affect the administration of justice in the courts of the State of Alaska.

This brief is necessary to expand on the methods by which representation of misdemeanor defendants can be provided without encumbering our judicial system. The brief of the petitioner is inadequate on this topic.

Respectfully submitted

STATE OF ALASKA

By John E. Havelock
Attorney General
State of Alaska

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BRIEF OF STATE OF ALASKA AS AMICUS CURIAE

In this brief the State of Alaska, as *amicus curiae* urges this Court to adopt a rule requiring representation in all misdemeanor cases where a conviction might possibly result in incarceration for however short a period after conviction. The type of representation urged is not restricted to representation by a member of the bar but would depend upon each state's selection of effective alternative methods of representation, all of which have as their purpose securing

fairness to the defendant. The Court is here asked only to declare that such a right exists in specific classifications of cases. The selection of alternative methods or the implementation of novel methods should be left to the states with this Court invalidating only those methods which on review are found to result in denial of the constitutional right to a fair, reasonably effective form of representation.

I

The course urged here is based in part upon dissenting and concurring opinions of Mister Justice Harlan in *Smith v. California*,[1] *Mapp v. Ohio*,[2] *Gideon v. Wainwright*,[3] *Miranda v. Arizona*,[4] and *In Re Gault*.[5] While the Bill of Rights provision in those cases differ, Harlan's opinion in each was that the function of the Court should be limited to declaring what those rights are.

It should not have directed the states in the specific manner by which they must guarantee those rights, but should have left to the states the choice of the particular method by which they would provide the announced constitutional guarantees to their citizens.

Differences in (1) misdemeanor case loads, (2) means of funding representation of indigents, (3) jurisdiction of state courts over misdemeanors, (4) ability of prosecutors of misdemeanor cases, and the probability that a requirement of representation by a member of the bar in all misdemeanor cases involving the possibility of any period of incarceration would subjugate the court systems of larger cities to a state of anarchy are reasons why fairness to defendants and efficiency of judicial administration would best be served by

[1] 361 U.S. 147 (1959)

[2] 367 U.S. 643 (1961)

[3] 372 U.S. 335 (1963)

[4] 384 U.S. 436 (1966)

[5] 387 U.S. 1 (1967)

this Court's enunciating the right, leaving the choice in its implementation to the states.

In *Smith v. California*,[6] the court held that a seller of an obscene book cannot be criminally liable absent a showing that he knew the contents to be obscene. Justice Harlan dissenting in part said[7] the trial court should not have found the book obscene without examining it in light of contemporary standards of the community. He would not restrict the type of evidence by which community standards of obscenity could be proved but would leave this decision to the states whose evidence laws differ.

In *Mapp v. Ohio*[8] Harlan, J., dissenting, was of the opinion that the majority should not have imposed both the federal search and seizure rule and the federal remedy of exclusion upon the states.

> The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State.... In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.[9]

And in *Gideon v. Wainwright*[10] Harlan, Jr., concurred:

> When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an

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[6]361 U.S. 147

[7]361 U.S. at 172

[8]367 U.S. 643 (1961)

[9]367 U.S. at 680-81

[10]372 U.S. 335 (1963)

> entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. In what is done today I do not understand the Court to depart from the principles laid down in *Palko v. Connecticut*, 302 U.S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.[11]

In *Miranda v. Arizona*[12] Harlan thought the court should not have gone so far as the rules announced by the majority when he dissented:

> It is no secret that concern has been expressed less long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past. But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.[13]

In *In Re Gault*[14] Harlan thought the Court should not have held the procedure of the Arizona court unconstitutional without first setting standards by which due process

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[11] 372 U.S. at 352

[12] 384 U.S. 436 (1966)

[13] 384 U.S. at 524

[14] 387 U.S. 1 (1967)

in juvenile courts is to be measured. Had it set such standards each state would have been allowed to choose the specific means by which its juvenile courts would comply with those standards.

> The Court should instead measure the requirements of due process by reference both to the problems which confront the State and to the actual character of the procedural system which the State has created. The Court has for such purposes chiefly examined three connected sources: first, the "settled usages and modes of proceeding," (citation); second, the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," (cite); and third, the character and requirements of the circumstances presented in each situation. . . .[15]

II

THERE ARE MEANS OF PROVIDING FAIR AND EFFECTIVE REPRESENTATION IN MISDEMEANOR CASES WITHOUT REQUIRING THE SERVICE OF A MEMBER OF THE BAR.

By leaving to the states the choice of method of representation each state will be encouraged to select the method best suited to its judicial system and best designed to provide representation where it is needed most in that state.

While some may assert that allowing this choice risks the possibility that the right will be denied, it is urged that this risk is outweighed by the benefits to be derived from the thorough consideration which will precede the choice of method and by this Court's power to review and invalidate ineffective means of representation.

Possible methods of representation are:

1. States could require the judge hearing a misdemeanor case to prohibit a prosecution by an attorney where

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[15] 387 U.S. at 68

the ability of the defense representation is incommensurate with that of the prosecution. If the prosecutor in a municipal court is just a police officer, then representation of the defendant by a law student or para-legal is fair.

2. Misdemeanor defendants could be tried without representation if the prosecutor urges and the court concurs that a penalty of fine only, not incarceration will be imposed upon a finding of guilt even though the statute allows a more severe penalty.

3. Misdemeanor defendants could be tried without representation where the state provides a modified inquisitorial system, similar to that used in juvenile courts, to replace the adversary system in misdemeanor cases.

4. States could examine and license para-legals to represent defendants in misdemeanor cases at the expense of the prosecuting municipality. Courses in constitutional law, criminal law and procedure and evidence comprise at most only one fifth of current law school curriculums. The substance of these courses presented in condensed form rather than by case method could be learned by the average college students in one semester. Such a program would likely be popular with students of law, pre-law, criminology and political science. It would encourage knowledge of law by layman to the benefit of all society. It would encourage complacent members of the legal profession to put forth their best efforts lest they be embarrased by an amateur. It would encourage the police to treat all accused misdemeanants with respect now accorded to only those who can afford to hire an attorney. It would improve the skill and provide experience for aspiring lawyers by affording them the opportunity to test and sharpen their legal abilities during pre-law and law school with resulting benefit to the profession and to a lawyer's first clients, civil and criminal, who frequently suffer the cost of errors in early trial experience.

These ancillary benefits alone would far outweigh the possibility that a representation requirement in misdemeanor cases might overburden the administration of criminal justice. To allow states and municipalities to first decide how much they can afford to spend on the courts, then select classes of defendants who will be protected, is a form of invidious discrimination far more class oriented than that outlawed in *Shapiro v. Thompson*[16]. Courts should strive to administer justice efficiently, not to administer less of it.

5. In states whose courts have already decided that an accused in a misdemeanor case is entitled to representation by a member of the bar, and should this Court hold the same, fairness and expediency would still be promoted by authorizing state courts to find a waiver of this right where states provide alternative methods of representation to encourage such a waiver.

III

THERE IS NO RATIONAL BASIS FOR A DENIAL OF REPRESENTATION TO INDIGENTS IN MISDEMEANOR CASES WHILE REQUIRING IT IN FELONY CASES.

The distinction between capital and non-capital felony cases was held by this Court in *Gideon v. Wainwright*[17] insufficient to ground denial of counsel to indigents in non-capital felony cases while granting counsel to indigents in capital cases. The reasoning in Gideon's brief applies with equal force to a similar difference in treatment of indigents based on the felony-misdemeanor distinction, to wit: the decisions that the defendant must make are as numerous and can be as complex, and the disparity between the prosecutor's ability and the defendant's is likely to be just as great.

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[16] 394 U.S. 618 (1969)

[17] 372 U.S. 335 (1963)

If representation by someone with knowledge of the criminal trial process is essential to a fair trial, as held in *Gideon*, then the distinction in the right to representation is based on the implied conclusion that since the sentence is less, it is all right to treat the defendant unfairly. In *Gault* this Court said:

> Under our Constitution, the condition of being a boy does not justify a Kangaroo court.[18]

Nor should the fact that the crime charged is a misdemeanor. Fairness is inherently lacking without representation.

The Alaska Supreme Court in *Baker v. City of Fairbanks*[19] extended the right to trial by jury to all criminal prosecutions which it defined

> as including any offense a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as drivers license or a license to pursue a common calling, occupation, or business. It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.[20]

The court stressed the importance of the consequences to the accused as a determinative factor:

> In interpreting the Alaska Constitution we must consider the consequences of denying jury trial to the person being prosecuted . . . . [T]he great bulk of the citizenry encounters the judicial process most frequently in the prosecution of what have been called the petty offenses. Punishments inflicted at that level can be as harsh and as devastating to the life of a citizen as those meted out for more serious misdemeanors and for felonious conduct. Why

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[18] 387 U.S. at 28

[19] 471 P.2d 386 (Alaska 1970)

[20] 471 P.2d at 402

> should the remedial process be less just at one level than at another.[21]

The research[22] and cases which conclude that representation is an absolute requirement of a fair trial in criminal cases are unimpressive literary exercises if they were meant to deny that such a right is just as essential in misdemeanor cases.

IV

UNLESS AN INDIGENT CHARGED WITH A MISDEMEANOR IS PROVIDED WITH REPRESENTATION, THE PROSECUTION HAS THE OPPORTUNITY TO ABUSE HIS CONTROL OVER THE PROCEEDINGS.

If an indigent in a misdemeanor case is not given representation, the prosecutor can charge the accused with a misdemeanor that was committed in the furtherance of a felony, and thereby control pre-trial proceedings, including questioning of the defendant, without the hindrance of a defense attorney. Facts gathered in the course of the misdemeanor prosecution could later be used in a felony prosecution arising out of the same facts. This result would frustrate the rule announced in *Massiah v. United States,*[23] that counsel is required at all proceedings before trial when consultation, investigation and preparation are vitally important.

It is difficult to limit the risk of prosecution in a misdemeanor case to the maximum six months incarceration since convictions for multiple misdemeanors arising out of the same set of circumstances can result in several six-month sentences to run consecutively. Unless indigents in misdemeanor cases are provided representation, prosecutors will

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[21] 471 P.2d at 401

[22] Report by the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society." (1967), pp. 86-87.

[23] 377 U.S. 201 (1964)

be encouraged to divide a felonious act into elements that will support misdemeanor charges, thus accomplishing indirectly what cannot be done directly without aid of counsel.

CONCLUSION

For the foregoing reasons, *amicus* State of Alaska respectfully requests this Court to hold that persons charged with a crime for which any period of incarceration is a possible sentence are entitled to be advised of their rights to that form of representation provided by the prosecuting government which *prima facie* will provide effective, fair protection of the rights of the accused.

Respectfully submitted,

STATE OF ALASKA

By John E. Havelock
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